62

Supreme Court, U.S.
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No. 07-143

IN THE

Supreme Court of the United States

GERARD A. BAILEY, PETITIONER

v.

PAPA JOHN'S USA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an important issue of law involving the burden of proof in an adverse employment action involving discrimination, and the dangerous precedent established by the Sixth Circuit. The Sixth Circuit deviated from this Court's and other jurisdictions in applying the burden of proof and persuasion in a Title VII case at the summary judgment stage. Such a different standard by the Sixth Circuit is against public policy and will only cause claimants to forum shop. A unified standard of proof must be applied.

Even though the Sixth Circuit stated that the Petitioner met the four-prong test, the Court erred in concluding that the Petitioner failed to rebut the Employer's purpose of termination. At the summary judgment stage, there existed genuine issues of disputed facts to suggest that the Employer's reason was not proven by the record.

Moreover, not only did the lower courts erroneously apply the applicable standards in a Title VII claim, the Petitioner (and his counsel) was improperly assessed with fees and costs, even though they conducted a thorough investigation prior to filing and pursuing all of the claims. Of course, such a precedent only deters viable claims.

Thus, the Writ should be granted to address these salient issues.

I. WHETHER THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF

A NON-DISCRIMINATORY LEGITIMATE PURPOSE IN AN EMPLOYMENT DISCRIMINATION CASE AND ERRONEOUSLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT IN VIOLATION OF THE CONSTITUTION?

II. WHETHER THE LOWER COURTS ERRONEOUSLY IMPOSED SANCTIONS UPON THE PETITIONER?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 4

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 21

APPENDIX

Circuit Court Opinion (6/11/07) 1a
Circuit Court Opinion (12/20/06) 14a
District Court Decision 25a
Order Denying Rehearing 36a

TABLE OF AUTHORITIES

Page

CASES

BEARD V. ANNIS, 730 F.2D 741, 743 (11TH CIR. 1984)..... 10, 14

BELL V. BOLGER, 708 F.2D 1312 (1983)..... 15

CELOTEX CORP. V. CATRETT, 477 U.S. 317, 322-25, 106 S.CT. 2548 (1986)..... 9

CENTURY PRODUCTS INC. V. SUTTER, 837 F.2D 247, 250 (6TH CIR. 1988)..... 22, 23

CHAUFFEURS, TEAMSTERS AND HELPERS V. TERRY, 110 S.CT. 1339, 1344-45 (1990)..... 17

CHRISTIANSBURG GARMENT CO. V. EEOC, 434 U.S. 412, 422, 98 S.CT. 694, 701 54 L.ED.2D 648 (1978)..... 21

CITY OF MONTEREY V. DELMONTE DUNES, 526 U.S. 687, 119 S.CT. 1624 (1999)..... 18

CLINE V. CATHOLIC DIOCESE OF TOLEDO, 206 F.3D 6512, 657 (6TH CIR. 2000)..... 8

DE-JESUS-ADORNO V. BROWNING FERRIS INDUS. OF PUERTO RICO, 160 F.3D 839, 841-842 (1ST CIR. 1998)..... 9

DIMICK V. SCHIEDT, 293 U.S. 474, 486 (1935)..... 17

EARLEY V. CHAMPION INTERNATIONAL CORP., 907 F.2D 1077, 1081 (11TH CIR. 1990)..... 14

FAJARDO SHOPPING CENTER, S.E. V. SUN ALLIANCE INS. CO. OF PUERTO RICO, INC., 167 F.3D 1, 7 (1ST CIR. 1999)... 9

FELICIANO V. STATE OF RHODE ISLAND, 160 F.3D 780. 788

(1ST CIR. 1998) 9

FUENTES V. PERSKIE, 32 F.3D 759, 764 (3RD CIR. 1994) 13

GRAND CHUTE V. WINEGAR, 82 U.S. 373, 375 (1872) 15, 17

HUNT V. CROMARTIR, 526 U.S. 541 (552 U.S. 1999) 16

JACOB V. NEW YORK CITY, 315 U.S. 752, 752-753 (1942) .16, 17

JONES V. CONTINENTAL CORP., 789 F.2D 1225, 1230 (6TH CIR. 1986) 22

KERNS V. CAPITAL GRAPHICS, INC., 178 F.3D 1011(1999) ... 15

LINDSEY V. PIZZA HUT OF AMERICA, 2003 WL 244826 (6TH CIR. 2003) 23

MARKMAN V. WESTVIEW INSTRUMENTS, INC., 517 U.S. 370, 376, 134 L.ED. 2D 577, 116 S.CT. 1384 (1995) 18

MEEKS V. COMPUTER DATA ASSOCIATION INTERNATIONAL, 15 F.3D 1013, 1019 (11TH CIR. 1994) 14

MENNONITE BD. OF MISSIONS V. ADAMS, 462 U.S. 791, 195, 103 S.CT. 2706, 2709, 77 L.ED.2D 180 (1982) 16

MULLANE V. CENTRAL HANOVER BANK & TRUST CO., 339 U.S. 306, 314, 70 S.CT. 652, 657, 94 L.ED. 865 (1950)..... 16

PETITTI V. NEW ENGLAND TELEPHONE AND TELEGRAPH CO., 909 F.2D 28, 34 (1ST CIR. 1990)..... 14

REEVES V. SANDERSON PLUMBING PRODUCTS, 530 U.S. 133 (2000)..... 12, 13

RIDDER V. CITY OF SPRINGFIELD, 109 F.3D 288, 292 (6TH CIR. 1997) 20, 22

SCOTT V. COUNTY OF RAMSEY, 180 F.3D 913 (1999) 15

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248, 250 (1981) 14

TITLE VII. MCCLAIN V. NORTHWEST COMMUNITY CORRECTIONS CENTER JUDICIAL CORRECTIONS BD., 440 F.3D 320, 332 (6TH CIR. 2006) 10, 11

TORRE V. CASIO, INC., 42 F.3D 825, 830 (3RD CIR. 1994) 14

TYSINGER V. POLICE DEPT. OF CITY OF ZANESVILLE, 463 F.3D 569, 576 (6TH CIR. 2006) 11, 12

WRIGHT V. MURRAY GUARD, INC., 455 F.3D 702, 707 (6TH CIR. 2006) 11

WRIGHT V. WEST, 505 U.S. 277, 296, 112 S.CT. 2482 (1995) ... 13

STATUTES

28 U.S.C. Section 1254 1

28 U.S.C. § 1927 ..... 17, 19

29 U.S.C. § 207(a)(1) 5

42 U.S.C. Section 1983 2

42 U.S.C. § 2000e 3, 5

RULES

Fed.R.Civ.P. 11(b) 17

Fed. R.Civ.P. 54(d)(1) 20

Fed.R.Civ.P. 56 ..... 2, 8

Fed.R.Civ.P. 56(c) 8

OTHER AUTHORITIES

ONCALE v. SUNDOWNER OFFSHORE SERVICES, 66 U.S.L.W. 4175 (U.S. MARCH 5, 1998) 9

SUPREME COURT'S CONSTRUCTION OF DUE PROCESS: 77 L.ED.2D. 1485 (1999) 16

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit issued two opinions regarding separate issues based on the same facts.

The United States Court of Appeals for the Sixth Circuit's first decision dated December 20, 2006 is set forth in the Appendix. (14a-24a). The second decision of the District Court was determined by the Sixth Circuit on June 11, 2007. A copy of this decision is set forth in Appendix as well. (1a-13a).

The decision of the United States District Court for the Western District of Kentucky dated June 14, 2005 is set forth in the Appendix. (25a-35a).

A Petition for Rehearing En Banc with respect to the earlier decision was denied on April 17, 2007. See Appendix. (36a-36a).

This Writ is timely filed and will address both decisions of the Sixth Circuit, since they are based on the same facts.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Sixth Circuit issued its final decisions on December 20, 2006 and June 11, 2007. A Petition for Rehearing En Banc was denied on April 17, 2007. This Petition was timely filed.

RELEVANT PROVISIONS INVOLVED

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

> The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

Fed.R.Civ.P. 56 (Summary Judgment)

> Rule 56(c) states in pertinent part that summary judgment will be granted only:
>
> If the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

42 U.S.C. Section 1983, Civil Rights

> *Section 1983. Civil Action for Deprivation of Rights.*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected,...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq.

42 U.S.C. Section 2000e provides:

> **Section 2000e. Unlawful employment practices**
>
> (a) Employer practices. It shall be an unlawful employment practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color.

STATEMENT

Procedural History

Gerard A. Bailey, the Plaintiff-Appellant, (hereinafter referred to as the "Petitioner"), filed a complaint in the United States District Court for the Western District of Kentucky against his former employer, Papa John's USA, Inc., (hereinafter referred to as "Employer"), alleging discrimination.

On February 2, 2004, the Employer filed a Motion for Summary Judgment and the Petitioner filed an Opposition. On June 14, 2005, the District Court granted the Employer's motion and also awarded attorney's fees ($5,000.00) and costs against the Petitioner. (25a-35a).

The Petitioner timely filed an appeal to the United States Court of Appeals for the Sixth Circuit. The Employer also filed a cross-appeal alleging that the District Court should have awarded a larger sanction.

The Sixth Circuit issued two separate decisions. The first decision dated December 20, 2006 affirmed the District Court's decision granting summary judgment as to the Petitioner's Title VII claim but on a different basis.(14a-24a). The second decision of the Sixth Circuit dated June 11, 2007, affirmed the assessment of attorney's fees and costs against the Petitioner. (1a-13a).

A Petition for Rehearing En Banc with respect to the earlier decision was denied on April 17, 2007. (36a-36a).

The Petitioner seeks relief by timely filing this Petition for Writ for Certiorari.

Facts

This is the case in which the Petitioner alleged race discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and violation of the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1).[1] The Petitioner was a former general manager of the Employer.

The Petitioner is an African-American male and began his employment as a general manager with the Employer in store number 83 in 1995. The store is located on Fort Campbell Boulevard near the federal Army base. The Petitioner worked as a general manager from 1995 to August 16, 2000. During this time, the Petitioner's work performance as a store manager was exceptional, as evidenced by the store's performance relative to the Employer's stores locally, regionally and nationally. The chart below sets forth the store's performance under the Petitioner's leadership:

YEAR	NATIONAL RANK OF 1200 STORES[1]	REGIONAL RANK OF 27 STORES	LOCAL RANK OF 5 STORES
1996	5TH /1200	3RD /27	1ST /5
1997	TOP 10/1200	3RD /27	1ST /5
1998	TOP 20/1200	3RD /27	1ST /5
1999	TOP 20/1200	3RD /27	1ST /5
2000	TOP 20/1200	3RD /27	1ST /5

[1] The Petitioner then waived his claim under the FLSA.

Despite the store's exceptional performance,[2] the Petitioner was not provided with periodic raises, whereas the majority of other store managers within the Nashville region were provided with raises. During the Petitioner's tenure with the Employer, the other general managers within the Nashville region were all white.

The Petitioner also was not given time off, as were the other managers. Additionally, the store facility in which the Petitioner managed was in such a state of disrepair, to include, but not be limited to, problems with the roof, sink, and ovens, that the condition of said facility impaired the store's overall effectiveness in terms of costs and productivity. Even after numerous requests, the Employer took minimal actions to remedy the problems associated with the facility. Shortly after his termination, however, repairs were indeed made to the facility. The facility itself was actually razed and rebuilt entirely following the Petitioner's termination.

In May 2000, the Petitioner was the only black manager in the Nashville region out of twenty-seven (27) stores. He was commended for his store's outstanding performance in May 2000. Less than four (4) months later, however, he was terminated. Not surprisingly, the Employer replaced the Petitioner with a white male store manager. Shortly after the white store manager took over the position, the repairs that

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1. The "National" stores refers to Papa John's stores nationwide.
2. The "Regional" stores refer to the twenty-seven (27) stores in the Nashville Region.
3. The "Local Region" refers to the five (5) stores in and around Clarksville Tennessee.

had been requested by the Petitioner were indeed made.

In August of 2000, the Petitioner was terminated without cause.

As a result, the Petitioner commenced the underlying action.

REASONS FOR GRANTING THE PETITION

I. THE LOWER COURTS DEVIATED FROM SUPREME COURT CASES AND FRACTURED THE LAW OF A NON-DISCRIMINATORY LEGITIMATE PURPOSE IN AN EMPLOYMENT DISCRIMINATION CASE AND ERRONEOUSLY GRANTED THE EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SINCE THERE EXISTED MATERIAL ISSUES OF DISPUTED FACTS THAT SHOULD HAVE BEEN RESOLVED BY A TRIER OF FACT IN VIOLATION OF THE CONSTITUTION.

This Honorable Court's review is necessary to resolve the issue of the burden of proofs in a wrongful termination case when there exists a failure to investigate a discrimination claim and terminate an employee when no substantial credible evidence exists to justify termination. The Sixth Circuit erroneously concluded that the Petitioner did not provide evidence to rebut the Employer's non-discriminatory purpose. At the summary judgment stage, there existed genuine issues of disputed material facts as to whether the Employer's reason was legitimate. The lower courts

failed to use the proper standard of review and assess all factual evidence and draw all reasonable inferences in favor of the Petitioner. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 6512, 657 (6th Cir. 2000).

Since this case was one determined on summary judgment and there were disputed material facts, at minimum the facts and inferences should have been weighed in the Petitioner's favor, this case should have been determined by a trier of fact. Fed.R.Civ.P. 56. The issues of whether the Employer's reason for termination for non-discriminatory and whether the Petitioner submitted evidence to meet his burden that the alleged purpose was termination was not true should have been weighed by a jury.

When considering whether to grant summary judgment, the Court should have determined whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show that there is a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In making this assessment, the Court must "accept all reasonable inferences favorable to the nonmovant." *Feliciano v. State of Rhode Island*, 160 F.3d 780. 788 (1st Cir. 1998). In deciding whether a factual dispute is "genuine," the Court must determine whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*; *see also Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.*, 167 F.3d 1, 7 (1st Cir. 1999); *De-Jesus-Adorno v. Browning Ferris Indus. Of Puerto Rico*, 160 F.3d 839, 841-842 (1st Cir. 1998) ("A trial worthy issue exists... [if] the evidence is 'sufficiently open-ended to permit a

rational factfinder to resolve the issue in favor of either side.'"); *Feliciano* at 784; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548 (1986). In weighing whether a factual dispute is "material," the Court must examine the substantive law of the case, because "only disputes over the facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson* at 248; see also *De-Jesus-Adorno* at 841-42 ("A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law.") In our facts, trialworthy disputed material facts existed, that is, whether the termination was based upon discriminatory practices. Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

Title VII of the 1964 Civil Rights Act prohibits "discrimination...because of...race". *Oncale v. Sundowner Offshore Services*, 66 U.S.L.W. 4175 (U.S. March 5, 1998). For claims such as Bailey's which lack direct evidence of intent to discriminate, the well-established *McDonnell Douglas/Burdine*[3] burden-

[3] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court established the standard necessary for a claimant to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases, the plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met

shifting framework applies to claims of discrimination brought under Title VII. *McClain v. NorthWest Community Corrections Center Judicial Corrections Bd.*, 440 F.3d 320, 332 (6th Cir. 2006)(citing *Mitchell* v. *Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992))(referencing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)).

> "To demonstrate a prima facie case, the plaintiff must show that '(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees.'"

Wright v. *Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006). Unlike the District Court who stated that the Petitioner failed to meet the third prong, the Sixth Circuit stated that the Petitioner did meet the four prong test. The burden then shifted to the Employer to articulate a legitimate, nondiscriminatory reason for the Petitioner's termination. *McClain*, 440 F.3d at 332. If the Employer articulated such a reason, the burden returns to the Petitioner to produce evidence from which a jury could find that the Employer's stated reason is not credible and is a mere

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this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, then the court must enter judgment for the plaintiff. *Id.*

pretext for discrimination. *Tysinger* v. *Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006).

In our facts, the Employer stated that it discharged the Petitioner because: (1) he allegedly refused to respond to his superiors questions regarding the 'integrity issues' and his unwillingness to accept the performance improvement plan; and (2) his persistent issues with food and labor costs up through his discharge.

With this alleged non-discriminatory purpose of terminating the Petitioner, then the burden once again shifted to the Petitioner to demonstrate the stated reasons for terminating his employment was pretextual. The Petitioner submitted genuine material disputed fact the reasons for his discharge had no basis in fact, did not actually motivate the Employer's decision to terminate employment, or were insufficient to warrant *Tysinger*, 463 F.3d at 576.

To meet his burden, the Petitioner submitted evidence that the store's progress was very competitive among other stores in the area and region. Given the disrepair of the store, the Petitioner had a profitable store. The Petitioner stated that he requested repairs in order to further increase the income. However, the Employer failed to do so. The Petitioner was terminated because of his race in an environment where there only exited white managers. These material issues should have been weighed by a jury.

In the case *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), this Court held that once the *McDonnell* criteria for establishing a prima facie

case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

Under the *Reeves* standard, once Petitioner met the four *McDonnell* criteria, then if the Court finds that the Employer's explanation of its actions not to be credible, there must be a finding of discrimination. There is no more shifting of burdens of proof and persuasion back to Petitioner. The Employer cited unsubstantiated and conflicting reasons for the termination. Proof that the employer's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination even though it is persuasive. *St. Mary*, at 517. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1995). As emphasized, it is the trier of fact, and not the judge on a summary judgment motion, to weigh the credibility of the explanation.

If given the opportunity, Petitioner would submit substantial evidence to discredit any proffered reason that discrimination was more likely than not a motivating or substantial cause of the adverse action.

See Fuentes v. Perskie, 32 F.3d 759, 764 (3rd Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3rd Cir. 1994). Contrary to the Circuit Court's opinion, the Petitioner met his burden through a demonstration that such "weaknesses, implausibilities, inconsistencies, incoherences, or contractions in the employer's proffered legitimate reasons for its action [are such] that a reasonable factfinder could rationally find them 'unworthy of credence.'" *Fuentes*, at 765.

Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984). The employer's explanation of its legitimate reasons must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). In our case, the reasons are boilerplate.

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994); including presenting a statistical pattern in the actual workplace where the discrimination occurred. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). The Petitioner showed a pattern of discriminatory actions against him – no other African American managers, no money to repair to store to increase profits, and no assistance for the increased costs. A statistical evidence of pattern of discrimination coupled with other evidence is a pretext

for an employment discrimination case. *Bell v. Bolger*, 708 F.2d 1312 (1983). The statistical pattern is direct evidence that overcomes the standard for a motion for summary judgment. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011(1999). When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999).

Given the burden of persuasion placed upon the Petitioner after the Employer failed to meet his burden of proof, the Sixth Circuit deviated from other jurisdictions. The evidence of productivity should have been sufficient to deny summary judgment. If the decisions are upheld, claims, such as that of the Petitioner, would never reach the jury thereby violating constitutional rights. So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be heard. Due Process Clause of the Fourteenth Amendment. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77

L.Ed.2d. 1485 (1999). The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied the basic constitutional concepts – Petitioner was not given a reasonable opportunity to present his case from an arbitrary or unjust appropriation. Instead his case was dismissed upon a summary judgment because the District Court failed to provide the correct standards of burden of proof and persuasion in a discrimination case.

In *Hunt v. Cromartir*, 526 U.S. 541 (552 U.S. 1999), this court reminded the lower courts again that before granting a summary judgment, they must not weight evidence and assess credibility of the parties or evidence because that belongs to the jury. In addition, the court noted that "the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." Rather than following this guide line and standard, the lower courts deviated by making findings of facts, assessing credibility of witnesses and evidence and weighing the evidence in light most favorable to the Employer.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942).

The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.* The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury.

Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. *Id*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). The Petitioner's case must fall to the jury in order to preserve his substantive right of the opportunity to be

heard of violations of Title VII and the burdens necessary to overcome summary judgment.

A review of the District Court's and Sixth Circuit's opinions demonstrate that they deviated from other jurisdictions. The lower courts heightened the burden for Petitioner to prove a discriminatory employment adverse action.

Therefore, the Petitioner respectfully requests that the decisions below be vacated.

II. THE LOWER COURTS ERRED IN ASSESSING ATTORNEY FEES AND COSTS AGAINST THE PETITIONER.

The District Court erroneously awarded $5,000.00 in attorney's fees to the Employer based upon alleged Rule 11 and 28 U.S.C. 1927 violations, and additionally awarded costs to the Employer pursuant to Rule 54 of the Federal Rules of Civil Procedure.

Fed.R.Civ.P. 11(b) provides that by presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of [his] knowledge, information, and belief, formed after reasonable inquiry under the circumstances, the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Subsection (c) of Rule 11 provides that "if, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may...impose an appropriate sanction upon

the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." The Advisory Committee's commentary on the 1993 amendments to the rule note that... if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

See also *Ridder v. City of Springfield*, 109 F.3d 288, 292 (6th Cir. 1997). That commentary also notes that "since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty." Further, it states that "in cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees . . ." *Id.* The Sixth Circuit has held that "the test for imposition of Rule 11 sanctions is whether the attorney's conduct was reasonable under the circumstances." *Ridder*, 109 F.3d at 293 (citing *Mann v. G & G Mfg., Inc.*, 900 F.2d 953, 958 (6th Cir. 1990), *cert. denied*, 498 U.S. 959, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990)).

The Petitioner's counsel submitted a detailed Affidavit of his work on the file, including his initial meeting with the Petitioner, his investigation, extensive research, and speaking with witnesses. The Attorney did not violate rule 11, nor did he violate 28

U.S.C. §1927. In fact, Title VII as well as the FSLA, both contain attorney's fees provisions. Granting the same to employer should be rare given the chilling effect to potential plaintiffs as well as the remedial purposes of Title VII and the FSLA.

The Petitioner did voluntarily dismiss the FSLA claim after it because apparent that he would not succeed on that claim. However, the count in the complaint was inserted after a thorough investigation of the facts, as evidenced by the Petitioner's attorney's affidavit. There was no trial or any prejudice suffered to the Employer. A Rule 11 fine should not have been awarded in the Employer's favor, especially since the amount was not substantiated by the Employer. The lower courts were confused as to legal analysis on the Title VII claim versus the FSLA claim. In light of the fact that the Sixth Circuit stated that the Petitioner met his initial burden of Title VII discrimination, the award must be vacated. Since the facts are similar for both counts, there is no justification for such an award.

Under § 706(k) of Title VII, "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422, 98 S.Ct. 694, 701 54 L.Ed.2d 648 (1978). There is no such finding in our facts, or, if so, it is a stretch of the imagination. Moreover, the Petitioner and his counsel never acted unreasonably and vexatiously in pursuing all claims against the Employer when they had a reasonable basis to make allegations of all elements for the causes of actions. 28 U.S.C. § 1927; *Jones v. Continental Corp.*, 789 F.2d

1225, 1230 (6th Cir. 1986); *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997). Given the lack of evidence to support a penalty of alleged rule and statute violations and the lack of malice or unreasonable behavior, the award must be vacated. In the decision is affirmed, then attorneys would be forced to minimize the counts brought against a defendant thereby jeopardizing their roles to protect their clients as well as defeating the purpose of discovery.

Furthermore, the Employer should have been denied costs pursuant to Fed. R. Civ. P. 54(d)(1), which provides that "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." The Petitioner has already been wrongfully penalized for pursuing causes of action against his former Employer. At the time of the filing of the complaint, the Petitioner and his attorney complied with Rule 11. Moreover, the Circuit Court did agree that the Petitioner met his four-prong test of discrimination. No award of costs is justified.

In *Century Products Inc. v. Sutter*, 837 F.2d 247, 250 (6th Cir. 1988), the court set forth the relevant factors to determine whether counsel's conduct was reasonable under the circumstances. There, the *Century Products* Court noted that what constitutes a reasonable inquiry may depend on such factors as the time available to the signor for investigation; whether the signor had to rely on a client for information as to the facts underlying the pleading, motion, or other paper was *based on a plausible view of the law*; or whether the signor depended on forwarding counsel or another member of the bar. Although a district court is given wide discretion in deciding whether counsel have

acted reasonably under the circumstances "the court is expected to avoid using he wisdom of the hindsight and should test the signor's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted." The conduct of counsel that is the subject of sanctions must be measured by an objective standard of reasonableness under the circumstances. *Id.* at 250-251; *Lindsey* v. *Pizza Hut of America*, 2003 WL 244826 (6th Cir. 2003) (wherein Rule 11 sanctions were denied even though magistrate said discrimination allegations were meritless).

Given this standard and precedent, the District Court and Sixth Circuit's award must be vacated, or at minimum, reduced to zero. It was unreasonable given the facts and circumstances established in the case.

CONCLUSION

The United States Court of Appeals for the Sixth Circuit and the United States District Court for the District of Kentucky have failed to properly apply Title VII and protect the Petitioner from unlawful acts caused by his former employer. The lower courts failed to provide the proper standards of proof. At minimum, inferences should have been weighed in the Petitioner's favor that the Employer's purpose was pre-textual and summary judgment denied. The Employer never presented a legitimate purpose for the Petitioner's termination. To place a heavier burden than defined under the statute and common law is unconstitutional and a deviation from due process.

Since a trier of fact did not weigh the evidence, the Petitioner's due process rights were violated and he

did not get the opportunity to present his claim before a jury.

Moreover, attorney's fees and costs were wrongfully imposed against the Petitioner when his attorney conducted a thorough investigation of the merits of the claims prior to filing a complaint.

Thus, this Honorable Court should grant writ so that the proper standards of proof in the Sixth Circuit be imposed in a Title VII cases. In the alternative, this Court may remand the cases with further instructions to the lower courts in the standards of proof in discrimination cases as well as when sanctions may be imposed against claimants.

The Court should grant *certiorari* to review these important matters and prevent these cases to be disposed of on summary judgment.

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(any footnotes trail end of each document)

Nos. 05-6068/05-6108
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Gerard Bailey,
Plaintiff-Appellant,

v.

Papa John's USA, Inc.,
Defendant-Appellant.

June 11, 2007, Filed

NOTICE:

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COUNSEL: For GERARD A. BAILEY, Plaintiff - Appellant, Cross-Appellee (05-6068, 05-6108): Kurt Walter Anderson, Hawes & Cameron, Hopkinsville, KY; Gary Jake Hodges, Robert J. Martin, Clarksville, TN.

For PAPA JOHN'S U.S.A., INC., Defendant - Appel-

lee, Cross-Appellant (05-6068, 05-6108): John O. Sheller, Stoll, Keenon, & Ogden, Louisville, KY.

JUDGES: BEFORE: Merritt and Moore, Circuit Judges; Collier, District Judge. *

OPINION BY: MERRITT

OPINION

MERRITT, Circuit Judge. Plaintiff Gerard Bailey filed a complaint in this action alleging (1) termination resulting from racial discrimination in violation of Title VII of the Civil Rights Act of 1964 and (2) failure to compensate for overtime worked in violation of the Fair Labor Standards Act. The district court granted summary judgment to defendant Papa John's USA, Inc. on both counts. *See Bailey v. Papa John's USA, Inc.*, 211 Fed. Appx. 417, 2006 WL 3740991 (6th Cir. 2006). Based on the district court's ruling, Papa John's filed a motion for attorney fees, litigation expenses and costs incurred in defending the case. Plaintiff's counsel, Robert J. Martin, pursued the Fair Labor Standards Act claim to summary judgment after the evidence clearly demonstrated that there was no factual basis to support the claim. The district court awarded costs and $ 5,000 in attorney fees to defendant. Both parties appeal the ruling. The issues specifically before us in this appeal are (1) whether the district court abused its discretion in imposing sanctions on Mr. Martin under Rule 11 and in imposing attorney fees on him under 28 U.S.C. § 1927 and (2) whether costs were justified under Federal Rule of Civil Procedure 54 and, on defendant's cross-appeal, (3) whether the amount of attorney fees awarded was sufficient to reimburse defendant for ex-

cessive attorney fees incurred as a result of plaintiff's counsel conduct.

We review a district court's decision to impose sanctions under Rule 11 or attorney fees under § 1927 for abuse of discretion. *Ridder v. City of Springfield*, 109 F.3d 288, 293, 298 (6th Cir. 1997). For the reasons set forth below, we affirm the judgment of the district court.

I.

To briefly recap the facts underlying the merits of the action, plaintiff, a former manager at Papa John's, alleged two counts in his complaint: (1) termination resulting from racial discrimination in violation of Title VII and (2) failure to compensate for overtime worked in violation of the Fair Labor Standards Act. Plaintiff was deposed on October 21, 2003, and conceded in his deposition that he was an exempt employee under the Fair Labor Standards Act and was therefore not entitled to overtime pay. n1 Based on the lack of evidence supporting the Fair Labor Standards Act claim at the conclusion of Bailey's deposition, defendant's counsel wrote letters on two different occasions to plaintiff's counsel asking him to withdraw the Fair Labor Standards Act claim. Plaintiff's counsel failed to respond to either letter and did not withdraw the claim. He explained at oral argument that he was experiencing family difficulties during that time. Defendant filed its motion for summary judgment four months later, on February 2, 2004. Plaintiff received several extensions in filing his response to the summary judgment motion and ultimately filed it in September 2004. The argu-

ment in support of the Fair Labor Standards Act claim was only one page. J.A. at 843.

On November 14, 2004, the district court granted summary judgment to defendant Papa John's on both counts. Bailey appealed only the Title VII claim to our Court and specifically waived his right to appeal his Fair Labor Standards Act claim. We affirmed the district court's judgment for defendant; but, because plaintiff did not appeal the Fair Labor Standards Act claim, we did not discuss the claim in the opinion on the merits. *See Bailey v. Papa John's USA, Inc.*, 211 Fed. Appx. 417, 2006 WL 3740991 (6th Cir. Dec. 20, 2006).

During the pendency of the appeal on the merits, defendant filed a motion in the district court for attorney fees totaling about $ 95,000 and for litigation expenses and costs in the amount of $ 3,334.50 (Memorandum in Support of Motion, J. A. at 1026; Bill of Costs, J.A. at 1054). Defendant sought attorney fees and costs for both the Title VII claim and the Fair Labor Standard Act claim. The motion was based on three grounds: Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927 and the district court's inherent power to award fees as described in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1981). Defendant did not seek attorney fees under the statutory provisions in Title VII or the Fair Labor Standards Act.

The district court awarded costs to Papa John's as the prevailing party under Fed. R. Civ. P. 54 (d)(1) n2 for the full amount of $ 3,334.50, and attorney fees in the amount of $ 5,000 - a little less than 5% of the defendant's request. (J.A. at 1112) The attorney fees were awarded pursuant to Rule 11 and 28 U.S.C. § 1927 be-

cause the district court found that plaintiff's counsel knew or should have known by the completion of plaintiff s deposition on October 21, 2003, that plaintiff was exempt from the provisions of the Fair Labor Standards Act and the claim lacked a factual basis, thereby rendering counsel's decision to pursue the claim further to the summary judgment stage unreasonable under the circumstances and in violation of his duty to the court under Rule 11. The district court did not award the fees pursuant to its inherent power because it did not find that plaintiff's counsel acted in bad faith, a requirement for such an award. Nor did the district court award any attorney fees to defendant for the Title VII claim, finding that the claim was not meritless because it was not unreasonable under the facts or the law for plaintiff to have pursued that claim through the summary judgment phase.

II.

The standard for granting attorney fees to a prevailing employer is more stringent than that for awarding fees to a prevailing employee. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417-18, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). The employer may be awarded attorney fees where the plaintiff's claim was "frivolous, unreasonable, or without foundation," or where the plaintiff continued to litigate after it became clear that his claim was frivolous, unreasonable or without foundation. *Id.* We first determine whether any sanctions or attorney fees were warranted under this standard.

Rule 11 requires attorneys to make reasonable inquiries to determine that their pleadings, motions and other papers are "well grounded in fact" and "warranted by

existing law or good faith argument for the extension, modification or reversal of existing law . . . ." *Freeman v. Michigan Dep't of State*, 808 F.2d 1174, 1180 (6th Cir. 1987). Plaintiff's opposition to defendant's motion for summary judgment constituted a written motion or other paper under Rule 11(b). n3 The Fair Labor Standards Act claim relating to the overtime hours did not have the necessary factual support, which Mr. Martin knew or should have known independently of Bailey's concession in his deposition testimony that he was a salaried employee. Bailey's primary duty at Papa John's was management: he regularly directed the work of approximately 37 or 38 other employees; interviewed, hired and then trained other employees; recommended raises; planned work schedules; and directed the work of his employees, thereby easily meeting the criteria of an exempt employee under the Fair Labor Standards Act. Therefore, the district court correctly found that Bailey's counsel's decision to pursue the Fair Labor Standards Act claim to summary judgment was unreasonable under the circumstances and in violation of his duty to the court under Rule 11.

Similarly, attorney fees under 28 U.S.C. § 1927 n4 are warranted when an attorney objectively "falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party." *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987). The purpose is to deter dilatory litigation practices. *See Jones v. Continental Corp.*, 789 F.2d 1225, 1230-31 (6th Cir. 1986). Because Section 1927 imposes an objective standard of conduct on attorneys, courts need not make a finding of subjective bad faith before assessing monetary sanctions under § 1927. *Id.* Instead, a district court may impose liability for attor-

ney fees under section 1927 when it determines that "an attorney reasonably should know that a claim pursued is frivolous." *Id.*

While imposition of section 1927 sanctions does not require a showing of subjective bad faith, something more than negligence or incompetence must be demonstrated. *See In Re Ruben*, 825 F.2d at 984; Jones, 789 F.2d at 1230 ("we hold that 28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety."). An attorney becomes sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings. *See United States v. Wallace*, 296 U.S. App. D.C. 93, 964 F.2d 1214, 1220 (D.C. Cir. 1992) (observing that recklessness is a lower standard than bad faith, requiring "deliberate action in the face of a known risk, the likelihood or impact of which the actor [inexcusably] underestimates or ignores.").

In this case, plaintiff filed a two-count complaint. When one count of a multi-count complaint turns out to be baseless after discovery, as here, that claim should be withdrawn. However, a claim is not groundless simply because it was ultimately unsuccessful. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). Whether a case is well-grounded in fact will sometimes not be evident until a plaintiff has been given a chance to conduct discovery. *See Runfola & Assoc., Inc. v. Spectrum Reporting II, Inc.*, 88 F.3d 368, 373-74 (6th Cir. 1996) (The "gravaman of Rule 11 [is not in] the filing of the claim that eventually turns out to be meritless, but rather the persis-

tence in pursuing that claim after the pleader has or should have become aware of its lack of merit."). Fee awards become proper only after counsel knew or should have known that the claim has no factual or legal basis.

In *Runfola*, the district court imposed sanctions not because plaintiff's claim was ultimately meritless, but because plaintiff excessively lengthened the discovery process and then failed voluntarily to dismiss the action after becoming aware of the inability to assert any competent evidence to support the claim. We based our decision on plaintiff's counsel's discovery abuse and failure to dismiss the case after becoming aware that it lacked merit, not on bringing the initial claim. As in *Runfola*, it is not sanctionable for plaintiff's counsel to have brought the claim in the first place because the standard for exemption under the Act is general and open to interpretation, and a valid basis may have existed prior to discovery. We will not disturb the district court's exercise of discretion where, as here, it decided not to award attorney fees back to the time of the filing of the case.

By failing to acknowledge that Bailey did not have a cognizable Fair Labor Standards Act claim, Bailey's attorney prolonged the inevitable at a cost to Papa John's. By refusing to voluntarily claim dismissed, counsel unreasonably protracted the proceedings. Accordingly, attorney fees are warranted.

III.

Once it is established that sanctions are warranted, the district court must determine the amount. In circum-

stances such as this, where there is no bad faith and where a claim's lack of merit became clear only after discovery, a defendant should be awarded attorney fees only to the extent counsel for defendant worked on the claim after plaintiff knew or should have known the claim was frivolous and should be withdrawn. If a party or the court is unlikely to have expended significant cost or incurred significant inconvenience based on a party's failure to withdraw a meritless claim, fees are generally not warranted in the absence of bad faith on the part of plaintiff. *Lisle v. Metro. Gov't of Nashville*, 73 Fed. Appx. 782, 2003 WL 21580642, at *8 (6th Cir. 2003).

In awarding the defendant $ 5,000 in attorney fees, the district court stated "the Court believes [$ 5,000] reasonably reflects the amount of time added to the litigation by Plaintiff's counsel's improper decision to pursue the [Fair Labor Standards Act] claim to summary judgment." Op. at 9, J.A. at 1120. The district court did not explain in detail how it reached the amount of $ 5,000. Documents in the record reflect only how many hours defendant's counsel spent on the entire case, which includes both claims. We cannot find in the record a document in which either party or the district court disentangled the costs of defending the Title VII claim from the Fair Labor Standards Act claim.

Although we would have preferred a more detailed accounting, or some other more specific explanation from the district court supporting the $ 5,000 award, in the absence of such an accounting or explanation, we look to the amount of argument devoted by defendant to the Fair Labor Standards Act claim in its summary judgment papers. We find that defendant devoted far less

space in its papers to the Fair Labor Standards Act claim than to the Title VII claim. According to our calculations based on Defendant's Motion for Attorney Fees, Litigation Expenses, and Costs, Civ. Act. No. 5:02-CV-00076-R (W.D. Ky. filed Dec. 30, 2004), n5 during the approximately four-month time frame between taking Bailey's deposition on October 21, 2003, and filing the summary judgment motion on February 2, 2004, defendant expended $ 19,047 in attorney fees. Looking at the award from that perspective, the $ 5,000 award is about one-fourth of the amount expended during the time period in which the district court found that it was improper for plaintiff's counsel to have pursued the Fair Labor Standards Act claim (Date of Bailey's deposition on October 21, 2003, to filing of summary judgment motion on February 2, 2004). After studying the facts in the record obtained by this Court from the district court, we conclude that the district court did not abuse its discretion in awarding $ 5,000 in attorney fees or approximately one-fourth of the total amount expended by defendant during the four-month period between plaintiff's deposition and the filing of defendant's summary judgment motion.

IV.

For the reasons discussed above in denying plaintiff's appeal, we also deny defendant's cross-appeal for reimbursement of all of its attorney fees. The Title VII claim was not meritless, and we have explained that the claim under the Fair Labor Standards Act did not become recognized as entirely meritless until the time of plaintiff's deposition.

Conclusion

It was clear before the summary judgment stage that the Fair Labor Standards Act claim lacked the necessary factual basis and was without evidentiary support. Bailey's attorney either knew, or reasonably should have known, that the Fair Labor Standards Act claim was meritless and the district court appropriately found counsel's conduct in continuing to pursue the claim to summary judgment violated section 1927 and Rule 11. For the foregoing reasons, we affirm the judgment of the district court.

Footnotes

*The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

[1]Salaried employees are exempt from the provisions of the Fair Labor Standards Act. The regulations implementing the Act set forth the "test" for determining whether an employee is paid "on a salary basis" and therefore exempt from the Act's provisions:

if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.29 C.F.R. § 541.602(a).

[2]Rule 54(d)(1) provides in pertinent part: "[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs."

[3](b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.Federal Rule of Civil Procedure 11.

4 § 1927. Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such

conduct.28 U.S.C. § 1927.

[5] Exhibit 1 to the Motion is a daily breakdown of the time worked on this case by the attorneys in defendant's law firm. The document gives the date, which attorney worked on the case that day, that attorney's rate, and the number of hours worked that day. There is no description of the work and no breakdown as to whether the time was spent on the Title VII. claim or the Fair Labor Standards Act claim.

No. 04-6499
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERARD A. BAILEY,
Plaintiff-Appellant,

v.

PAPA JOHN'S USA, INC.,
Defendant-Appellee.

December 20, 2006, Filed

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COUNSEL: For GERARD A. BAILEY, Plaintiff - Appellant: Kurt Walter Anderson, Hawes & Cameron, Hopkinsville, KY; Gary Jake Hodges, Robert J. Martin, Clarksville, TN.

For PAPA JOHN'S U.S.A., INC., Defendant - Appellee: John O. Sheller, Smith & Smith, Louisville, KY.

JUDGES: BEFORE: MERRITT and MOORE, Circuit Judges; COLLIER, District Judge. *

OPINION BY: CURTIS L. COLLIER

OPINION

CURTIS L. COLLIER, District Judge. Plaintiff-Appellant Gerard Bailey ("Bailey") appeals the district court's grant of Defendant-Appellee Papa John's USA, Inc. ("Papa-John's") motion for summary judgment. Although we do not agree with the district court's analysis, we AFFIRM the District Court's grant of summary judgment because Bailey is unable to show Papa John's reason for terminating Bailey's employment was mere pretext for discrimination.

I. FACTS AND PROCEDURE

The facts of the case have been recited in full in the district court's opinion below and are fully incorporated here. On March 18, 2002, Bailey sued his former employer, Papa John's, shortly after being terminated from his position as general manager of a Papa John's restaurant in Oak Grove, Kentucky. Bailey, an African-American, claimed his termination was a result of race-based discrimination.[1] On February 2, 2004, following the completion of discovery, Papa John's moved for summary judgment.[2]

In Papa John's reply brief on the motion for summary judgment, Papa John's conceded Bailey met the first, second and fourth criteria required for a Title VII claim. Bailey is a member of a protected class (he is African-American), was subjected to an adverse employment action (he was terminated) and was replaced by a person outside the protected class (a white store manager). Papa John's asserted, and the district court found, Bailey failed to introduce sufficient evidence to raise a genuine issue of material fact as to the third cri-

teria for a Title VII claim, that is, Bailey must have been qualified for the position at the time.

Accordingly, on November 15, 2004, the district court granted Papa John's motion for summary judgment. Citing Bailey's long history of sub-par performance and Papa John's reasonable expectations, the district court concluded Bailey did not present a prima facie case because there was no genuine issue of material fact as to whether Bailey was meeting Papa John's expectations at the time of his termination. This decision was based primarily upon Bailey's continued failure to meet Papa John's established profitability goals and Bailey's refusal to agree to a performance improvement plan. On December 13, 2004, Bailey timely appealed the district court's grant of summary judgment with respect to the Title VII claim.

II. STANDARD OF REVIEW

The Court reviews *de novo* a district court's order granting summary judgment. *Smith v. Ameritech*, 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Initially, the burden is on the moving party to conclusively show no genuine issues of material fact exist, *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003), and the Court must view the evidence and draw all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). However,

the nonmoving party is not entitled to a trial merely on the basis of allegations, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Id.* at 323, 106 S. Ct. at 2552.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper jury question, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); *Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003). The standard for summary judgment mirrors the standard for directed verdict. *Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52, 106 S. Ct. at 2512. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the Court concludes a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.; Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

III. ANALYSIS

A. Prima facie case

For claims such as Bailey's which lack direct evidence of intent to discriminate, the well-established *McDonnell Douglas/Burdine* burden-shifting framework applies to claims of discrimination brought under Title VII. *McClain v. NorthWest Community Corrections Center Judicial Corrections Bd.*, 440 F.3d 320, 332 (6th Cir. 2006)(citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992))(referencing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). "To demonstrate a prima facie case, the plaintiff must show that '(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees.'" *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006)(quoting *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004)). As mentioned above, it is undisputed Bailey meets the first, second, and fourth elements; Papa John's fired Bailey, an African-American, and replaced him with a white manager. Papa John's argued, and the district court found, Bailey's prima facie case fails on the third element because Bailey's performance did not satisfy Papa John's reasonable standards and expectations.

The district court held Bailey could not establish a prima facie case because he was not qualified for his job as manager of the Papa John's store. This conclusion was based upon the undisputed "underlying facts which, taken together, indicated [Bailey] simply was not performing to his employer's reasonable satisfaction." (Joint Appendix, p. 1005). In support of this conclusion, the district court pointed out Bailey had a significant,

on-going difficulty managing the labor and food costs to meet Papa John's profitability goals. Citing Bailey's long history of sub-par performance and Papa John's reasonable expectations, the district court concluded there was no genuine issue of material fact as to whether Bailey was meeting Papa John's expectations at the time of his termination.

This case is similar to *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564 (6th Cir. 2003). In *Wexler*, the district court concluded the plaintiff could not establish a prima facie case because he was not qualified for his job as a store manager based upon the undisputed fact that the store's sales were declining. *Id.* at 574. This court held the district court's conclusion was flawed for two reasons. First, a district court "may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case" as this would bypass the burden-shifting analysis and "deprive the plaintiff of the opportunity to show that the nondiscriminatory reason was in actuality a pretext designed to mask discrimination." *Id.* Second, the *Wexler* panel found there was "insufficient proof in the record for us to conclude that [the plaintiff] was unqualified, as a matter of law, because of the store's declining sales." *Id.* at 575. The plaintiff disputed the drop in sales at his store was proof that he was unqualified and argued the decline in sales was due to factors other than his performance. *Id.*

In the present case, the district court's conclusion Bailey failed to establish a prima facie case is flawed for the same two reasons the district court's decision in *Wexler* was flawed. In considering Papa John's reason for taking an adverse employment action when analyz-

ing the prima facie case, the district court deprived Bailey of the opportunity to show Papa John's reason for terminating his employment was a pretext to mask discrimination. Further, there was insufficient proof for the district court to find, as a matter of law, the failure to meet Papa John's reasonable expectations were proof of Bailey's being unqualified for the job. Bailey, like the plaintiff in *Wexler*, disputes his failure to meet Papa John's expectations was related to his performance and qualifications for the job and points to various other factors as contributing to his problem with controlling labor and food costs.

At the prima facie stage, "a court should focus on a plaintiff's objective qualifications to determine whether he or she is qualified for the relevant job." *Id.* at 575. A plaintiff can meet the prima facie burden of showing he or she is qualified "by presenting credible evidence that his or her qualifications are at least equivalent to the minimum objective criteria required for employment in the relevant field." *Id.* at 575-76. "Although the specific qualifications will vary depending on the job in question, the inquiry should focus on criteria such as the plaintiff's education, experience in the relevant industry, and demonstrated possession of the required general skills." *Id.* at 576.

In this case, looking at the evidence in the light most favorable to Bailey, he did possess the minimum objective qualifications for employment in the field.

B. Pretext

As the district court found Bailey did not sustain his burden of establishing a prima facie case, the district court did not consider the matter further. Since this

Court concludes Bailey sustained his burden of establishing a prima facie case, the burden then shifts to Papa John's to articulate a legitimate, nondiscriminatory reason for Bailey's termination. *McClain*, 440 F.3d at 332. If Papa John's articulated such a reason, the burden returns to Bailey to produce evidence from which a jury could find that Papa John's stated reason is not credible and is a mere pretext for discrimination. *Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006).

In briefing the summary judgment motion, the parties both argued to the district court what should happen if the district court found Bailey sustained his burden of establishing a prima facie case.[3] Papa John's reply brief at the summary judgment stage stated "the basis for Papa John's decision to discharge Bailey was two-fold: (1) Bailey's refusal to respond to his superiors' questions regarding the 'integrity issues' and his unwillingness to accept the performance improvement plan; and (2) Bailey's persistent issues with food and labor costs up through his discharge." (Joint Appendix, p. 205). Upon Bailey's refusal to cooperate in the performance improvement plan and his refusal to discuss the letter alleging "integrity issues" in a meeting with the regional vice president, area supervisor and district manager, Bailey's employment was terminated.

To demonstrate Papa John's stated reasons for terminating Bailey's employment was pretextual, Bailey must show the reasons offered by Papa John's for his discharge either: (1) have no basis in fact; (2) did not actually motivate Papa John's decision to terminate Bailey's employment; or (3) were insufficient to warrant Bailey's termination. *Tysinger*, 463 F.3d at 576. Bailey's

response brief (at the summary judgment stage) states the following in arguing Papa John's reason is pretextual:

The Defendant has indicated that the Plaintiff's termination was nondiscriminating as it was based upon his work performance. The Plaintiff worked for the defendant for five and half [sic] (5 1/2) years, and the only written evaluation that the Defendant utilized to substantiate their claim is the evaluation of 9-2-1996, approximately a year and a half after the Plaintiff began his tenure with the Defendant. See, Plaintiff's Affidavit. No other written evaluations were produced or referenced to indicate that the Plaintiff continued with a negative performance in the store.(Joint Appendix, p. 857). As the facts underlying Bailey's failure to meet Papa John's expectations are undisputed and Papa John's has fired other managers for failing to meet the same standards,[4] it seems Bailey's argument invokes the second prong.

This court does not find Bailey's argument persuasive. Even if the September 1996 evaluation was the only written documentation offered, there are substantial facts outlined in Bailey's own deposition, as well as the depositions of Bailey's supervisor and district manager, which show Papa John's was dissatisfied with Bailey's store's performance and actively tried to help Bailey improve the store's profitability. Once their efforts to help failed and Bailey refused to sign the performance improvement plan or even discuss the "integrity issues" Bailey vaguely made reference to in his letter, Bailey's employment was terminated. Nothing of Bailey's argument addresses this evidence or produces any evidence contradicting it. In short, Bailey offers no evi-

dence demonstrating the undisputed facts in the record showing Bailey's performance did not meet Papa John's standards did not motivate Papa John's decision to discharge Bailey. Further, Bailey failed to proffer any evidence that discrimination was the real reason for his discharge. As such, summary judgment is proper on Bailey's Title VII claim.

IV. CONCLUSION

Because Bailey failed to show Papa John's reason for terminating Bailey was mere pretext for discrimination, we AFFIRM the District Court's grant of summary judgment for Papa John's.

Footnotes

*The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

[1]Bailey also claimed he was illegally denied compensation for overtime worked, in violation of the Fair Labor Standards Act, 29 U.S.C. § 207(a). Bailey does not pursue an appeal of the district court's grant of summary judgment on his Fair Labor Standards Act claim.

[2]As the district court's opinion on the summary judgment motion pointed out, Papa John's summary judgment motion relied heavily on Bailey's own admissions during his deposition, including: (1) Bailey was not meeting Papa John's performance expectations; (2) Papa John's expectations were not unreasonable; and (3) Bailey never heard racial remarks at any time during his employment with Papa John's.

[3]At oral argument, Bailey agreed that he had notice and opportunity to demonstrate pretext below and had no further evidence.

[4]At oral argument, Papa John's counsel pointed out the manager who was hired to replace Bailey was also eventually fired for failing to meet Papa John's standards.

CIVIL ACTION NO. 5:02CV-76-R
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION

GERARD A. BAILEY, PLAINTIFF

v.

PAPA JOHN'S U.S.A., INC., DEFENDANT

June 14, 2005, Decided

COUNSEL: For Gerard A. Bailey, Plaintiff: Gary J. Hodges, Clarksville, TN; Kurt Walter Anderson, Hawes & Cameron, Hopkinsville, KY; Robert J. Martin, Clarksville, TN

For Papa John's U.S.A., Inc., Defendant: John O. Sheller, Smith & Smith, Louisville, KY

JUDGES: Thomas B. Russell, Judge, United States District Court

OPINION BY: Thomas B. Russell

OPINION

MEMORANDUM OPINION

Defendant Papa John's U.S.A., Inc. (Papa John's) has filed a Motion for Attorney Fees (Dkt. # 52). Plaintiff has responded (Dkt. # 55, 56, 59 and 61), and Defendant has replied (Dkt. # 57, 58, and 62), and this matter is now ripe for decision. For the reasons stated below,

Defendant's motion is GRANTED in part and DENIED in part.

BACKGROUND

Plaintiff Bailey filed the complaint in this action alleging (i) termination resulting from racial discrimination in violation of *Title VII of the Civil Rights Act of 1964* and (ii) failure to compensate for overtime worked in violation of the *Fair Labor Standards Act (FLSA)*. On November 15, 2004, this Court granted Defendants' Motion for Summary Judgment, finding that Mr. Bailey had not presented evidence sufficient to raise a genuine issue of material fact for trial on either his Title VII claim or his FLSA claim. Mr. Bailey is currently appealing this decision to the Sixth Circuit Court of Appeals. In the meantime, Defendant seeks an order from this Court compelling Plaintiffs to compensate it for attorney fees, litigation expenses and costs incurred in defending the case. Defendant cites three bases for its request: *Fed. R. Civ. P. 11*, *28 U.S.C. § 1927*, and this Court's inherent power to award fees as described in *Roadway Express, Inc. v. Piper*, *447 U.S. 752, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1981)*. The Court will address each in turn.

ANALYSIS

Claims against Kurt Anderson and Gary Hodges

One of the responses to Defendant's motion was from Kurt W. Anderson, the attorney who initially filed Plaintiff's complaint. After the filing, however, it appears that Mr. Anderson was not actively involved in the case, and the Court allowed Mr. Anderson to withdraw as counsel on August 12, 2004. Defendant's argu-

ments in this motion deal with counsel's actions in maintaining the claims to the summary judgment stage, especially in light of Plaintiff's deposition testimony. It does not appear from the documents filed with the Court that Mr. Anderson was in any way involved in these decisions, nor did he sign the Response to Defendant's Motion for Summary Judgment. Therefore, Defendant's Motion as to Mr. Anderson is denied. Although Mr. Hodges did not file a response to this motion, it appears that his situation is similar to Mr. Anderson's and therefore the Motion as to him is also

denied. Fed. R. Civ. P. 11

Rule 11 of the Federal Rules of Civil Procedure describes some of the circumstances under which courts may impose sanctions. *Rule 11(b)(3)* provides that:

> by presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of [his] knowledge, information, and belief, formed after reasonable inquiry under the circumstances, the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Subsection (c) of Rule 11 provides that "if, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." The

Advisory Committee's commentary on the 1993 amendments to the rule note that

> . . . if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. *Subdivision (b)* does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

See also *Ridder v. City of Springfield, 109 F.3d 288, 292 (6th Cir. 1997)*. That commentary also notes that "since the purpose of *Rule 11* sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty." Further, it states that "in cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees . . ." *Id.* The Sixth Circuit has held that "the test for imposition of *Rule 11* sanctions is whether the attorney's conduct was reasonable under the circumstances." *Ridder, 109 F.3d at 293* (citing *Mann v. G & G Mfg., Inc., 900 F.2d 953, 958 (6th Cir. 1990), cert. denied, 498 U.S. 959, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990)).*

The thrust of Defendant's argument for a *Rule 11* violation is essentially that, as to both Plaintiff's Title VII claim and Plaintiff's FLSA claim, as of the time of the taking of Plaintiff's deposition it was so clear that

there was insufficient evidence to support the claims that Plaintiff's pursuit thereof to the summary judgment stage constituted a violation of *Rule 11*. Specifically, since *Rule 11* focuses on filings signed by the party or attorney in question, Defendants point to Plaintiff's Response to the Motion for Summary Judgment, in which Plaintiff claimed that he could make out a prima facie case of race discrimination and that there was a genuine issue of material fact as to Plaintiff's FLSA claim.

In that responsive filing, Plaintiff cites an incorrect standard for the prima facie case; Plaintiff suggests that his action was governed by the test set forth in *Allen v. Michigan Dept. of Corrections*, which governs Title VII cases based upon a failure to promote, when in fact it was governed by the *Mitchell v. Toledo Hosp.* test for discharges allegedly in violation of Title VII. *Allen v. Michigan Dep't of Corrections, 165 F.3d 405, 410 (6th Cir. 1999)*; *Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992)*. Next, Plaintiff incorrectly asserted that "Defendant has conceded that the Plaintiff can prove the first three (3) elements in a prima facie [case]." (Response to Motion for Summary Judgment, Dkt. # 41, at 9). In fact, Defendant conceded the first, second, and *fourth* elements of the prima facie case; namely, that Plaintiff was a member of a protected class, that he was subjected to adverse employment action, and that he was replaced by a person outside the protected class. [1] (Motion for Summary Judgment, Dkt. # 14, at 20). Defendant challenged the third element of the prima facie case, which required Plaintiff to demonstrate that he was qualified for the position. *Id.* Defendant argued, and the Court agreed, that Plaintiff had not introduced evidence sufficient to raise a genuine

issue of material fact as to the question of whether he was performing to his employer's reasonable satisfaction. (Memorandum Opinion, Dkt. # 47, at 5). Because the prima facie case failed, the Court did not reach the burden-shifting portion of the *McDonnell Douglas* analysis. There was not, however, a complete lack of evidence to support Plaintiff's assertion that he was performing to his employer's reasonable satisfaction; he had received excellent reviews in the past and presented several circumstances which may have explained his store's performance deficiencies. The Court, however, found that these facts were insufficient as a matter of law to cause Defendant's expectation that he would work to remedy the profitability issues to have been unreasonable. For *Rule 11* purposes, the Court cannot say that Plaintiff's allegation that he could make out a prima facie case for Title VII-prohibited discrimination was *without* evidentiary support. Therefore, the Court does not believe *Rule 11* sanctions are appropriate.

As to the FSLA claim, Plaintiff asserted that he was not exempted from the provisions of the FLSA because he was not paid "on a salary basis" within the meaning of the Act. This argument was based upon a provision in the "performance improvement plan," which was drafted by Plaintiffs supervisor as an attempt to remedy the profitability issues with Plaintiff's store. The provision stated that, if Plaintiff's store failed to meet the goals set forth in the plan, his regular salary would be reduced by $ 50.00 in the future. The Court held that this provision was not the type of salary reduction which would remove an employee from the category of employees paid "on a salary basis" under the statute.

Although Defendant does not seek the award of fees under the provision in Title VII which grants district courts the authority to award them in cases brought under that statute, the *Rule 11* commentary counsels that courts should not "employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees." Under *§ 706(k) of Title VII*, "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422, 98 S.Ct. 694, 701 54 L.Ed.2d 648 (1978).*

Defendant's argument rests in part on Plaintiff's deposition testimony, in which, apparently without objection, Defendant's counsel asked Plaintiff to concede that he was paid on a salary basis under the FLSA, and Plaintiff did so concede. Given that there was no evidence to indicate that Plaintiff was an expert in labor law, the Court sees no reason that Plaintiff's legal conclusion ought to be binding on his counsel. Factual statements that constitute admissions, of course, might be another matter, but this legal conclusion alone is not sufficient to bind Plaintiff's counsel to the position that the FLSA claim was without merit. Nevertheless, the Court finds that Plaintiff's counsel ought to have come to the same conclusion independent of his client's opinion. In its Memorandum Opinion granting summary judgment, the Court analyzed whether the provision in the "performance improvement plan" would have removed Plaintiff from the category of an employee paid "on a salary basis" for FLSA purposes. As the Court noted, however, Plaintiff never signed or agreed to the

plan, and there was no evidence introduced to indicate that the deduction was ever made. Further, there was no other evidence to indicate that Plaintiff was not paid on a salary basis within the meaning of the statute. The FLSA claim, then was without evidentiary support and Plaintiff's counsel's decision to pursue the claim to the summary judgment stage was unreasonable under the circumstances and in violation of his duty to the court under *Rule 11*.

28 U.S.C. § 1927

Defendant also argues that Plaintiff's counsel, in pursuing of Plaintiff's claims under the FLSA, acted in violation of *28 U.S.C. § 1927*, which provides that:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

The Sixth Circuit Court of Appeals has held that this provision "authorizes a court to assess fees against an attorney for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety." *Jones v. Continental Corp., 789 F.2d 1225, 1230 (6th Cir. 1986)*. In that case, the court explained that a finding of "bad faith" on the part of the party in question was not required for liability under *§ 1927. Id.* In *Ridder v. City of Springfield*, the Sixth Circuit Court of Appeals upheld a district court's grant of

attorney fees pursuant to *§ 1927* in a civil rights case in which the plaintiffs attorney "brought suit against the City of Springfield and individual Springfield police officers without any evidence to support a basis for municipal liability, and he persisted in pressing the allegations for over five years, despite unearthing no evidentiary support for the claims even after full discovery." *109 F.3d 288, 298 (6th Cir. 1997).*

Defendant's claim that Plaintiff's counsel in this case violated *§ 1927* derives from Plaintiff's counsel's failure to voluntarily dismiss the FLSA claim after his client's deposition, at which Defendant asserts it became clear that the claim lacked the necessary factual basis. As discussed *supra*, the claim was without evidentiary support. "When an attorney, though not guilty of conscious impropriety, intentionally pursues a claim that lacks plausible legal or factual basis" and when "an attorney knows or reasonably should know that a claim pursued is frivolous," that attorney has unreasonably and vexatiously multiplied the litigation, and an assessment of fees against that attorney is appropriate. *Jones, 789 F.2d at 1230* (citing *Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 226-27 (7th Cir. 1984)* (internal quotation marks omitted)). Plaintiff's counsel's decision to pursue the FLSA claim in this case after it became clear that it lacked a factual basis meets this standard.

District Court's Inherent Power to Award Fees

A district court has inherent authority "to award fees when a party litigates in bad faith, vexatiously, wantonly, or for oppressive reasons." *Big Yank Corp. v. Liberty Mut. Fire Ins. Co., 125 F.3d 308, 313* (citing *Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S.*

240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975) and *Colombrito v. Kelly, 764 F.2d 122, 133 (2d Cir.1985))* (internal quotation marks omitted). To make such an award, "a district court must find that the claims advanced were meritless, that counsel knew or should have known this, and that the motive for filing the suit was for an improper purpose such as harassment." *Id.*, quoting *Smith v. Detroit Fed'n of Teachers, Local 231, 829 F.2d 1370, 1375 (6th Cir. 1987)*. Although, as discussed supra, Plaintiff's FLSA claim was meritless, no evidence indicates that the claim was brought or litigated for the purpose of harassing Defendant or for any other improper purpose. Therefore, an exercise of the Court's discretion to award fees would be inappropriate in this case.

Amount of the award

Because Plaintiff's counsel's unreasonable behavior stemmed only from his decision to pursue the FLSA claim to the summary judgment stage after it became clear that the claim lacked merit, he should only be responsible for such of Defendant's fees as are attributable to this claim, not the Title VII claim. The evidence indicates that none of the depositions taken in this case were attributable only to the FLSA claims and that the FLSA claim was only a small part of the defense of the case as a whole. Therefore, the Court will award Defendant $ 5,000 in attorney fees, which the Court believes reasonably reflects the amount of time added to the litigation by Plaintiff's counsel's improper decision to pursue the FLSA claim to summary judgment.

Costs

Defendant also seeks recovery of costs pursuant to *Fed. R. Civ. P. 54(d)(1)*, which provides that "costs

other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Plaintiff argues that "the specific statutes regarding attorney's fees costs under Title VII should be adequate for this court to address the Defendant's last issue under *Rule 54* costs." (Plaintiff's Response, Dkt. # 61, Attachment # 1, at 19). Defendant has not invoked the attorney fee provisions of Title VII, but in any case the attorney fee provision would not govern an award of non-attorney fee costs. The court therefore awards costs to Defendant in the amount specified in Defendant's Bill of Costs. (Dkt. # 53)

CONCLUSION

For the reasons above, the court GRANTS in part and DENIES in part Defendant's motion for attorney fees and costs. An appropriate order shall issue.

June 14, 2005

Thomas B. Russell, Judge

United States District Court

Footnote

[1] The two tests are similar, but the prong that Plaintiff argued Defendants challenged was that "there [was] a causal connection between the employment action . . . and [Plaintiff's] status as a member of the protected class." Allen, 165 F.3d at 410. Plaintiff's arguments as to this causal connection are inapposite of the "qualified for the position" prong actually at issue.

No. 04-6499
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERARD A. BAILEY,
Plaintiff-Appellant,

v.

PAPA JOHN'S USA, INC.,
Defendant-Appellee.

Filed 4/17/2007

JUDGES: BEFORE: MERRITT and MOORE, Circuit Judges; COLLIER, District Judge. *

The court having received a petition for rehearing en banc, and the petition haying been circulated not only to the original panel members but also to aII other active judge of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel. The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Footnote

*The Honorable Curtis L. Collier, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

No. 07-143

In the Supreme Court of the United States

GERARD A. BAILEY,

Petitioner,

v.

PAPA JOHN'S USA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's application of the *McDonnell Douglas* analytical framework does not conflict with a decision of this Court or a Court of Appeals, nor does it implicate an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the Sixth Circuit's Opinion affirming the District Court's imposition of sanctions under Fed. R. Civ. P. 11 and attorney fees under 28 U.S.C. § 1927 does not conflict with a decision of this Court or a Court of Appeals, nor does it implicate an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Papa John's USA, Inc. is a wholly owned subsidiary of Papa John's International, Inc., a publicly-owned corporation.

TABLE OF CONTENTS

Questions Presented i

Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6 ii

Table of Contents iii

Table of Authorities v

Opposition to Petition for Writ of Certiorari 1

Introduction 1

Statement of the Case 2

Reasons the Petition Should Be Denied 8

I. The Decisions Below are Entirely Consistent with the Burden Shifting Framework Set Forth in McDonnell Douglas 8

II. Petitioner's Reference to "Statistical Evidence" in the Petition is Deficient 12

III. Petitioner has Failed to Present Either an Intra-Circuit or an Inter-Circuit Conflict Among the Courts 13

IV. The District Court's Imposition of Attorney Fees and Sanctions Against Petitioner and his Counsel is Reviewed for Abuse of Discretion, the Lower Court Did Not Abuse its Discretion, and There are No Compelling Reasons to Grant The Petition 15

A. The District Court did not abuse its discretion in imposing sanctions and attorney fees against Petitioner and his counsel 16

B. There are no compelling reasons to grant the Petition as it concerns the imposition of sanctions and attorney fees against Petitioner and his counsel 17

Conclusion 18

TABLE OF AUTHORITIES

Cases

Cline v. Catholic Diocese of Toledo,
206 F.3d 651 (6th Cir. 2000) 13

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 374 (1990) 15

DiCarlo v. Potter,
358 F.3d 408 (6th Cir. 2004) 8, 9

Kern v. TXO Prod. Corp.,
738 F.2d 968 (8th Cir. 1984) 15

Layne & Bowler Corp. v. Western Well Works, Inc.,
261 U.S. 387 (1923) 14

Mann v. C & G. Mfg., Inc.,
900 F.2d 953 (6th Cir. 1990) 16

McClain v. NorthWest Community Corrections Center Judicial Corrections Bd.,
440 F.3d 320 (6th Cir. 2006) 13

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 8, 10, 12

Moody v. Albemarle Paper Co.,
417 U.S. 622 (1974) 13

Peters v. Lincoln Electric Co.,
285 F.3d 456 (6th Cir. 2002) 11

Plair v. E.J. Brach & Sons, Inc.,
105 F.3d 343 (7th Cir. 1997) 12

Reeves v. Sanderson Plumbing Products,
530 U.S. 133 (2000) 11, 12

Ridder v. City of Springfield,
109 F.3d 288 (6th Cir. 1997) 15

Smith v. Leggett Wire Co.,
220 F.3d 752 (6th Cir. 2000) 12

St. Mary's Honor Center v. Hicks,
509 U.S. 502 (1993) 9, 12

Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981) 8

Tysinger v. Police Dept. of City of Zanesville,
463 F.3d 569 (6th Cir. 2006) 10, 13

United States v. American-Foreign S.S. Corp.,
363 U.S. 685 (1960) 13

United States v. Sotelo-Murillo,
887 F.2d 176 (9th Cir. 1989) 13

Wright v. Murray Guard, Inc.,
455 F.3d 702 (6th Cir. 2006) 13

Statutes

28 U.S.C. § 1927 . . . . . *passim*

Rules

Fed. R. Civ. P. 11 . . . . . *passim*

Fed. R. Civ. P. 54 8

Fed. R. Civ. P. 54(d)(1) 7

Sup. Ct. R. 10 . . . . . 1, 8, 17

Sup. Ct. R. 10(a)-(c) 1

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner has presented no "compelling reasons" for his Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. Petitioner has failed to demonstrate that the Sixth Circuit's December 20, 2006 Opinion affirming the District Court's application of the *McDonnell Douglas* analytical framework is in conflict with a decision of this Court or another Court of Appeals. *See* Sup. Ct. R. 10(a)-(c). Likewise, Petitioner has failed to demonstrate that the Sixth Circuit's June 11, 2007 Opinion affirming the District Court's imposition of sanctions under Fed. R. Civ. P. 11 and attorney fees under 28 U.S.C. § 1927 is in conflict with a decision of this Court or another Court of Appeals. *See* Sup. Ct. R. 10(a)-(c). In fact, Petitioner has not even carried his significantly less strenuous burden of showing that the District Court's imposition of sanctions and attorney fees was an abuse of discretion – which would, in any event, constitute insufficient grounds to grant the Petition. *See* Sup. Ct. R. 10(a)-(c).

Furthermore, Petitioner has failed to demonstrate that the Sixth Circuit, in either of its two opinions, decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c).

Petitioner has failed completely to demonstrate any compelling reasons for this Court to grant the Petition. Accordingly, the Court should deny the Petition.

STATEMENT OF THE CASE

Petitioner is an African-American male who worked at Papa John's Store 83 in Oak Grove, Kentucky near the Fort Campbell military base. Petitioner was Store 83's general manager from the date of his hire in 1995 until his termination in 2000. Petitioner was required to work a minimum of forty hours per week, received a fixed base salary regardless of hours worked, and was not entitled to overtime pay. (Ct. App. JA 600-01). Store 83 initially prospered during Petitioner's tenure, but sales peaked in 1996, leveling off by 1997. (Ct. App. JA 617). Petitioner received two raises during his employment with Papa John's: a raise from $425 to $450 per week on January 1, 1996, and a raise from $450 to $650 per week on July 1, 1996. (Ct. App. JA 627, 223). Petitioner typically received store performance bonuses during his first three years of employment, ranging from $700 to $2,000 per month. (Ct. App. JA 605).

In 1996, Petitioner's Area Supervisor evaluated his job performance. The written evaluation noted several areas needing improvement, including product quality, management and employee training, time management, and handling of customer complaints. Petitioner's Area Supervisor also counseled Petitioner to take vacation time to avoid "burn out." (Ct. App. JA 627, 211). Petitioner's Area Supervisor, on several occasions, instructed Petitioner to decrease his labor costs in accordance with the store's labor budget percentage. (Ct. App. JA 617).

By the late 1990's, several changes occurred within Papa John's. Papa John's experienced a major growth period. (Ct. App. JA 369-75, 436-37, 506-07, 625). As part of the necessary formalities that accompany such an expansion, the corporate office began holding management employees more

accountable for day to day store operations and financial statements. Papa John's managers could no longer operate each individual store as they saw fit. Papa John's became a complex, publicly-traded corporation which demanded structure, formality and tightened financial standards. Petitioner acknowledges that, during this period, the corporate climate changed and expectations were higher. (Ct. App. JA 625).

By early 1999, Petitioner began having serious problems meeting the legitimate expectations of his superiors. Petitioner disregarded directives to manage his labor supply in accordance with the percentage mandated by the corporate office. (Ct. App. JA 617). Petitioner's food costs were higher than allowable for his store to operate efficiently. (Ct. App. JA 625). Petitioner acknowledged that there are two ways to increase store profits: increase sales and/or decrease costs. (Ct. App. JA 630). He also acknowledged that a high-volume store, such as his, increases profits by decreasing costs. (Ct. App. JA 630). Ultimately, because of his deficiencies in meeting food and labor budget goals, Petitioner was required to attend management training meetings in nearby Nashville, Tennessee. (Ct. App. JA 812). Despite the many warnings and training sessions, Petitioner's problems with food and labor costs continued. (Ct. App. JA 617, 625, 706).

During this time, Petitioner complained about store maintenance and repair. Because Papa John's corporate office planned to relocate or rebuild Store 83, it was reluctant to expend large sums of money to replace equipment or renovate the building. (Ct. App. JA 708). Nevertheless, basic repairs requested by Petitioner were performed and the store was fully operational. (Ct. App. JA 609). Moreover, the store had the potential to look even better, but Petitioner

himself failed to follow through with several of his requests for improvements. Despite permission or authority to act, Petitioner failed to remedy a broken fence, secure extra seating, purchase and change light bulbs in the menu board, and wash windows. (Ct. App. JA 724, 725, 733, 706.)

By 2000, sales at Store 83 began to slip even farther, and Petitioner's food and labor costs remained higher than budget goals. (Ct. App. JA 649, 799, 614-15). Store 83 consistently had one of the highest labor percentages in its area. (Ct. App. JA 718). Petitioner did have one good sales month in April 2000 when Papa John's celebrated its anniversary by offering special deals on pizzas. (Ct. App. JA 223). Petitioner's coupon-based "success" in April 2000 was short lived; by May 2000, Store 83's numbers dropped and remained low in June 2000. (Ct. App. JA 814-15, 358).

In addition to his store's poor performance, Petitioner failed or refused to implement Papa John's computerized Labor Management System. (Ct. App. JA 710, 647). Petitioner also failed or refused to instruct his employees to use company-mandated portion control cups to ensure that each pizza conformed to Papa John's quality and appearance standards and to decrease wasted product by applying too many ingredients. Petitioner rationalized that the use of the portion control cups was too time-consuming. (Ct. App. JA 643-44).

Because of Store 83's poor sales and Petitioner's failings, Papa John's prepared a performance improvement plan which set out specific areas where Petitioner needed improvement. (Ct. App. JA 309). To ensure that Petitioner had a fair opportunity to achieve the plan's goals, it contained a 25% margin of error relating to the allowance for food waste and labor costs. The plan was clear, however, that if the stated

goals were not met, a management change would occur. (Ct. App. JA 309, 225). Petitioner expressed his unhappiness with the plan and refused to sign it. (Ct. App. JA 631).

In refusing to sign the performance improvement plan, Petitioner raised several business related issues that were without merit and reflected no indicia of race discrimination. Indeed, with regard to Petitioner's allegations otherwise, the record is clear that:

- *All* managers in Petitioner's area were required to attend mandated meetings, not just Petitioner. (Ct. App. JA 634).

- Petitioner set his own schedule and presented no evidence that his vacation requests were ever denied. (Ct. App. JA 672-73, 245).

- Petitioner obtained permission from his supervisors to work on holidays. No one required him to do so. (Ct. App. JA 612).

- There is no evidence that Petitioner was not supported in reasonable marketing and advertising efforts subject to budget constraints. (Ct. App. JA 837).

- Petitioner admitted that he failed to retrieve uniforms from former employees. (Ct. App. JA 648-49).

- There is no evidence that Petitioner's store was insufficiently staffed. If anything, his store's excessive labor costs show overstaffing. (Ct. App. JA 646).

- All Papa John's store managers were required to balance and control labor costs. Proper employee training and management would have increased the efficiency of Store 83. (Ct. App. JA 817).

It is also imperative to note that Petitioner never raised the issue of race discrimination prior to or as a part of his complaints against the performance improvement plan. It appeared for the first time in an EEOC charge filed long after the termination of Petitioner's employment. (Ct. App. JA 653, 237).

On August 17, 2000, Petitioner met with his area supervisors to discuss his progress and his complaints against the performance improvement plan. (Ct. App. JA 640, 751). Petitioner refused to participate in any discussions and later stated that "I just did not feel that it was necessary for me to give them that information at that point in time." (Ct. App. JA 642). When repeated attempts to implore Petitioner to discuss his progress, his complaints, and the performance improvement plan failed, Papa John's terminated Petitioner's employment. (Ct. App. JA 722). Petitioner made no attempt to salvage his job by providing any of the requested information. He instead chose to leave the room. (Ct. App. JA 641-42, 722). Petitioner refused to sign the status sheet confirming his discharge, just as he had refused to sign the performance improvement plan. (Ct. App. JA 233).

Therefore, despite Petitioner's unfounded statement that he was "terminated without cause" (Pet. at 7), Papa John's decision to terminate Petitioner's employment was at least two-fold: (1) his refusal and unwillingness to accept the performance improvement plan and (2) his persistent issues with food and labor costs up through his discharge. (Ct. App. JA 642, 233).

At no time before or during this meeting did Petitioner claim that he had been discriminated against at any time during his employment with Papa John's. (Ct. App. JA 640). Petitioner admitted that he never heard any of his supervisors use racial slurs at any time during his employment with Papa John's. (Ct. App. JA 614).

Petitioner filed suit against Papa John's in 2002, claiming that his termination was a result of race-based discrimination in violation of Title VII of the Civil Rights Act of 1964. Petitioner also claimed that he was illegally denied compensation for overtime worked as required by the Fair Labor Standards Act ("FLSA"). On February 2, 2004, at the completion of extensive discovery, Papa John's moved for summary judgment. On November 15, 2004, the District Court granted Papa John's motion for summary judgment on both counts, concluding that Petitioner failed to present a prima facie case of discrimination and that he was an exempt managerial employee under the FLSA. Properly reviewing the District Court's decision *de novo*, the Sixth Circuit affirmed summary judgment in Papa John's favor on December 20, 2006.

Pursuant to the District Court's ruling, Papa John's filed a motion for attorney fees, costs, and litigation expenses incurred in defending the case. Papa John's also moved for sanctions against Petitioner's counsel for pursuing the FLSA claim to summary judgment after the evidence clearly demonstrated that there was no factual or legal basis to support the claim. The District Court awarded Papa John's costs as the prevailing party under Fed. R. Civ. P. 54(d)(1) in the amount of $3,334.50 and attorney fees in the amount of $5,000. The attorney fees were awarded pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 because the District Court found that Petitioner's counsel knew or should have known

that Petitioner was exempt from the FLSA and that the claim lacked a factual basis. Contrary to Petitioner's misleading and confusing statements otherwise, the District Court did *not* award attorney fees or costs under the fee-shifting provisions of the substantive statutes at issue – Title VII and the FLSA – but under the generally applicable provisions of federal law found at 28 U.S.C. § 1927, Fed. R. Civ. P. 11, and Fed. R. Civ. P. 54. On June 11, 2007, the Sixth Circuit, properly reviewing the District Court's decision for abuse of discretion, affirmed the District Court's judgment.

REASONS THE PETITION SHOULD BE DENIED

The decisions below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. THE DECISIONS BELOW ARE ENTIRELY CONSISTENT WITH THE BURDEN SHIFTING FRAMEWORK SET FORTH IN MCDONNELL DOUGLAS.

Title VII single-motive claims proceeding on circumstantial evidence, such as this case, are analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later modified by *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). This framework first requires that the plaintiff establish a prima facie case. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). Once a prima facie case has been shown, the plaintiff is entitled to a rebuttable presumption that the defendant discriminated

against him or her in violation of Title VII. *Burdine,* 450 U.S. at 254. The defendant then bears the burden of production to put forth a "legitimate, nondiscriminatory reason" for the complained of adverse treatment. *Id.* at 253. "The explanation provided must be legally sufficient to justify a judgment for the defendant." *Id. at* 255. If the defendant meets this burden, the presumption of discrimination created by the prima facie case falls away, *id.* & n. 10, and the plaintiff then needs to show that the defendant's "'legitimate nondiscriminatory reason'" was a "'pretext for discrimination.'" *Id.* at 253. Throughout this burden-shifting approach, the plaintiff continues to bear the ultimate burden of proving, by a preponderance of the evidence, the intent to discriminate. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 509 (1993).

To demonstrate a prima facie case, the plaintiff must show that "(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees." *DiCarlo,* 358 F.3d at 415.

In this case, the Sixth Circuit held that Petitioner did demonstrate a prima facie case. After reaching such a conclusion, the Sixth Circuit then properly shifted the burden to Papa John's to articulate a legitimate, non-discriminatory reason for Petitioner's termination. The Sixth Circuit found that Papa John's did just that, noting that Papa John's decision to discharge Petitioner was two-fold: (1) Petitioner's refusal to discuss with his superiors certain "integrity issues" and his unwillingness to accept the performance improvement plan; and, (2) Petitioner's persistent issues with food and labor

costs up through his discharge. (Ct. App. JA 175, 205, 209, 617, 625-26, 639, 642, 715, 717, 744, 809).

The Sixth Circuit, again properly employing the *McDonnell Douglas* burden shifting framework, required that Petitioner show that Papa John's legitimate and non-discriminatory reasons were a pretext for discrimination. To demonstrate that Papa John's reasons for terminating Petitioner's employment were pretextual, Petitioner was required to show that Papa John's stated reasons: (1) have no basis in fact; (2) did not actually motivate Papa John's to terminate Petitioner's employment; or, (3) were insufficient to warrant Petitioner's discharge. *Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006).

Petitioner did nothing more than submit a self-serving affidavit regarding his own personal perception of his performance and written evaluations. The Sixth Circuit, noting that Papa John's expectations for Petitioner were undisputed and that Papa John's had fired other managers for failing to meet those same standards, was not persuaded by Petitioner's affidavit. The Sixth Circuit properly found the record to be clear that Papa John's and Petitioner's supervisors were dissatisfied with his performance and actively tried to help him improve Store 83's performance. As noted by the Sixth Circuit, Petitioner presented no evidence whatsoever contradicting Papa John's expectations, his failure to meet those expectations, or his unwillingness to accept the performance improvement plan. Petitioner failed to present any evidence that his inability to meet Papa John's standards did not motivate Papa John's decision to terminate his employment. Furthermore, Petitioner failed to offer any evidence that discrimination was the real reason for his discharge.

Petitioner apparently believes that summary judgment is precluded in a Title VII action if and when a prima facie case has been demonstrated. That is simply not the case.

> If the bare bones elements of plaintiff's prima facie case were sufficient to make this showing, ... the entire 'burden shifting' analysis of *McDonnell Douglas* and its successors would be illusory ... Accordingly, we hold that, in order to make this type of rebuttal showing, *the plaintiff may not rely simply upon his prima facie evidence, but must, instead, introduce additional evidence of [prohibited] discrimination*.

Peters v. Lincoln Electric Co., 285 F.3d 456, 472 (6th Cir. 2002) (emphasis added). In this case, Petitioner introduced *no* evidence of prohibited discrimination in rebuttal of Papa John's legitimate, non-discriminatory reasons for the termination of Petitioner's employment.

Petitioner cites to *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000) to support his Petition. (Pet. at 11-12). Petitioner's citation to *Reeves*, however, is inaccurate and misleading. Petitioner states that this Court in *Reeves* held that once a plaintiff establishes his prima facie case, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. That much is true. Petitioner then states that this Court in *Reeves* held that if the employer's explanation is not credible, then the plaintiff does not need to produce further evidence of discriminatory intent. That is not what this Court held in *Reeves*. To the contrary, this Court in *Reeves* held that the employer's burden to produce evidence of a legitimate, non-discriminatory reason for a plaintiff's termination is "one of production, not persuasion; it 'can involve *no* credibility assessment.'" *Id.* at

142 quoting *St. Mary's Honor Center*, 509 U.S. at 509 (emphasis added). Petitioner's description of *Reeves* is disingenuous.

This Court's decision in *Reeves* is consistent with *McDonnell Douglas* and *St. Mary's Honor Center*, and the Sixth Circuit's opinion in this case is entirely consistent with those cases as well as existing Sixth Circuit case law. Once Papa John's produced legitimate, non-discriminatory reasons for Petitioner's discharge, *Reeves* required Petitioner to "prove by a preponderance of the evidence that the legitimate reasons offered by [Papa John's] were not its true reasons, but were a pretext for discrimination." 530 U.S. at 143. Petitioner failed to present *any* such evidence. Accordingly, the Sixth Circuit properly affirmed the District Court's grant of summary judgment for Papa John's.

II. PETITIONER'S REFERENCE TO "STATISTICAL EVIDENCE" IN THE PETITION IS DEFICIENT.

Petitioner argues that discrimination can be proved by presenting a "statistical pattern in the actual workplace where the discrimination occurred." (Pet. at 13.) Petitioner then states that he has shown a pattern of discrimination. Petitioner states that there were no other black managers, that he was denied money to repair his store, and that he received no assistance for certain increased costs. (Pet. at 13.)

First, statistical evidence is not relevant in a disparate treatment case. *See, e.g., Smith v. Leggett Wire Co.*, 220 F.3d 752, 762 (6th Cir. 2000); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 349 (7th Cir. 1997) (holding statistics to be "improper vehicles to prove discrimination in disparate treatment (as opposed to disparate impact) cases").

Second, even if statistical evidence were appropriate in this case, Petitioner has failed at all stages to offer sufficient information for this Court, or any other court, to consider in evaluating the reliability or probative value of his statistical arguments. Petitioner's "statistical evidence" has no probative value whatsoever to his claim of discrimination. Petitioner has failed to introduce *evidence* regarding the relevant labor market; Petitioner has failed to introduce *evidence* identifying the number of minorities in the relevant labor market; and, Petitioner has failed to introduce *evidence* as to how many African-American individuals were available, and qualified, in the relevant market to work as a general manager of a Papa John's restaurant. In sum, Petitioner's statistical "proof" fails to support an inference of discrimination.

III. PETITIONER HAS FAILED TO PRESENT EITHER AN INTRA-CIRCUIT OR AN INTER-CIRCUIT CONFLICT AMONG THE COURTS.

Petitioner initially alleges that the Sixth Circuit in this case deviated from its prior decisions in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), *McClain v. NorthWest Community Corrections Center Judicial Corrections Bd.*, 440 F.3d 320 (6th Cir. 2006), *Wright v. Murray Guard, Inc.*, 455 F.3d 702 (6th Cir. 2006), and *Tysinger v. Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006). Petitioner's remedy for a perceived intra-circuit conflict is an en banc review. *See Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974) (en banc proceedings are to secure or maintain uniformity of decisions within a circuit); *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685 (1960) (principal utility of en banc proceedings is to secure uniformity of decisions within a circuit); *United States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989) (an intra-

circuit conflict may be resolved only through en banc proceedings). Petitioner did in fact seek en banc review. The Sixth Circuit received Petitioner's petition for rehearing en banc, the petition was circulated among all active judges of the court, and *not one* of the judges requested a vote on the suggestion for rehearing en banc. Accordingly, the Sixth Circuit denied the petition for rehearing en banc.

Petitioner, having failed to demonstrate an intra-circuit conflict, switches gears and now contends that there is an inter-circuit conflict. Petitioner states that the Sixth Circuit has "fractured the law" with its decision in this case. (Pet. at 7.) Petitioner, however, fails to identify any opinion from any other circuit that is in conflict with the Sixth Circuit's decision in this case. Petitioner's argument essentially boils down to a contention that the District Court erred in granting summary judgment in Papa John's favor, and that the Sixth Circuit erred in affirming the District Court's decision. Chief Justice Taft made it clear long ago that the Supreme Court cannot function as an ordinary appellate court concerned with achieving justice in individual cases; rather, the Court is to grant a writ of certiorari in only those cases involving important public matters and in cases where there is a "real and embarrassing conflict of opinion" between the circuit courts of appeal. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923). Former Chief Justice Rehnquist has written that instead of seeking merely to correct erroneous decisions, the Court is looking for cases "involving unsettled questions of federal constitutional or statutory law of general interest." REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS, p. 269 (William Morrow & Co. 1987). Clearly, this case does not fit the former Chief Justice's description.

This case presents no intra-circuit conflict – the en banc Sixth Circuit has confirmed that fact, and this case presents no inter-circuit conflict, Petitioner having failed to identify any opinions in conflict with the Sixth Circuit's decision. Furthermore, this case does not involve any matters of great public concern. Accordingly, the Court should deny the Petition.

IV. THE DISTRICT COURT'S IMPOSITION OF ATTORNEY FEES AND SANCTIONS AGAINST PETITIONER AND HIS COUNSEL IS REVIEWED FOR ABUSE OF DISCRETION, THE LOWER COURT DID NOT ABUSE ITS DISCRETION, AND THERE ARE NO COMPELLING REASONS TO GRANT THE PETITION.

A district court's decision to impose sanctions under Fed. R. Civ. P. 11 or attorney fees under 28 U.S.C. § 1927 is reviewed for abuse of discretion. *Ridder v. City of Springfield*, 109 F.3d 288, 293, 298 (6th Cir. 1997). This highly deferential standard of review allows a range of choices for the district court, so long as the choice does not constitute a clear error of judgment. *See Kern v. TXO Prod. Corp.*, 738 F.2d 968, 971 (8th Cir. 1984) (abuse of discretion review "presupposes a zone of choice within which the trial courts may go either way"); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 374, 405 (1990) (a court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence). Accordingly, even if this Court would not have imposed sanctions or attorney fees on its own accord does not mean that the District Court abused its discretion in doing so.

A. The District Court did not abuse its discretion in imposing sanctions and attorney fees against Petitioner and his counsel.

If evidentiary support for a pleaded contention is not obtained after a reasonable opportunity for investigation and discovery, then the party has a duty under Fed. R. Civ. P. 11 not to persist with that contention. *Mann v. C & G. Mfg., Inc.*, 900 F.2d 953, 958-59 (6th Cir. 1990), *cert. denied*, 498 U.S. 959 (1990); Fed. R. Civ. P. 11 Advisory Committee Notes (1993 Amendments). Fed. R. Civ. P. 11 provides, in pertinent part:

> By presenting to the court ... a pleading ... an attorney ... is certifying that to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... *the allegations and other factual contentions have evidentiary support* or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.... (Emphasis added).

Petitioner and his counsel violated Rule 11. Considering the above-standard in relation to Petitioner's FLSA claim, the District Court clearly did not abuse its discretion in awarding Papa John's fees and costs. Petitioner and his counsel knew *prior to filing this action* that Petitioner was an exempt managerial employee and, as such, not entitled to overtime. Petitioner then expressly admitted during his deposition on October 21, 2003 that he never expected to receive compensation for overtime work and that he was never entitled to overtime pay. (Ct. App. JA 600-01, 671). Petitioner knew his compensation scheme, and Petitioner's counsel knew his client's deposition testimony; nevertheless,

Petitioner and his counsel pursued the FLSA claim through the conclusion of the summary judgment stage. Petitioner required Papa John's to brief the motion fully, and required the District Court to deliberate on the motion fully, instead of withdrawing the claim. Only after receiving an adverse decision from the District Court did Petitioner finally abandon the FLSC claim on appeal.

Despite the overwhelming evidence and admissions made during Petitioner's deposition, he and his counsel continued to perpetuate the baseless allegation that Petitioner was entitled to overtime pay. The insupportable allegations in Petitioner's Complaint, summary judgment response, and Affidavit present textbook examples of Rule 11 violations. Therefore, the District Court's holding that "Plaintiff's counsel's decision to pursue the [FLSA] claim to the summary judgment stage was unreasonable under the circumstances and in violation of his duty to the court under Rule 11," (Ct. App. JA 1117), was neither arbitrary nor unjustified.

B. There are no compelling reasons to grant the Petition as it concerns the imposition of sanctions and attorney fees against Petitioner and his counsel.

While the decision to impose sanctions and attorney fees is reviewed for abuse of discretion, Petitioner must also carry his significantly more strenuous burden of demonstrating that there are compelling reasons to grant the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioner has not carried his burden because this case is wholly unremarkable and one in which the District Court exercised its considerable discretion under Fed. R. Civ. P. 11

and 28 U.S.C. § 1927. Even if Petitioner and his counsel were erroneously assessed fees and costs of $8,334.50 – which they have never paid – it would not warrant granting the Petition.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Papa John's respectfully requests that the Court deny the Petition.

Respectfully submitted,

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62

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No. 07-143

IN THE
Supreme Court of the United States

GERARD A. BAILEY, PETITIONER

v.

PAPA JOHN'S USA, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

District Court Memorandum Opinion *37a*

District Court Order *46a*

District Court Judgment *47a*

11/12/2004

CIVIL ACTION NO. 5:02CV-76-R

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION

GERARD A. BAILEY, PLAINTIFF

v.

PAPA JOHN'S U.S.A., INC., DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on motion for summary judgment (Dkt. # 14) of Defendant Papa John's U.S.A., Inc. ("Papa John's"). Plaintiff Gerard A. Bailey ("Bailey") responded (Dkt. # 41), Defendant replied (Dkt. #46), and this matter is now ripe for adjudication. For the reasons that follow, the Court GRANTS the Defendant's motion.

BACKGROUND

Plaintiff Bailey filed this action in 2002, shortly after being terminated from his position as general manager of a Papa John's pizza restaurant in Oak Grove, Kentucky near the Fort Campbell military base. Bailey, an African-American, claims that his termination was a result of race-based discrimination on the part of Papa John's in violation of Title VII of the Civil Rights Act of 1964. Plaintiff also claims that he was illegally denied compensation for overtime worked as required by the Fair Labor Standards Act.

STANDARD

Summary judgment is available under Fed. R. Civ. P. 56(c) if the moving party can establish that the "pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[N]ot every issue of fact or conflicting inference presents a genuine issue of material fact." *Street v. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989). The test is "whether the party bearing the burden of proof has presented a jury question as to each element in the case." *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). The plaintiff must present more than a mere scintilla of evidence. To support his position, he must present evidence on which the trier of fact could find for the plaintiff. *See id.* (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986)). Mere speculation will not suffice to defeat a motion for summary judgment: "[t]he mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." *Monette v. Electronic Data Systems Corp.*, 90 F. 3d 1173, 1177 (6th Cir. 1996).

ANALYSIS

I. Plaintiff's Claim of Racial Discrimination

Plaintiff's claim of racial discrimination under 42 U.S.C. §§ 2000(e), *et. seq.*, is governed by the standard set forth in *Mitchell v. Toledo Hosp.*, in which the Sixth Circuit Court of Appeals adopted a four-part test from the United States Supreme Court's decision in *McDonnell Douglas Corp. v. Green:*

i. Plaintiff must be a member of a protected class;
ii. Plaintiff must have been discharged;
iii. Plaintiff must have been qualified for the position at issue; and
iii. Plaintiff must have been replaced by a person outside the protected class.

Mitchell v. Toledo Hosp. 964 F2d 577 (6th Cir. 1992), citing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). Defendant in its reply brief concedes that Plaintiff meets the first, second and fourth criteria, but asserts that Plaintiff fails to introduce evidence sufficient to raise a genuine issue of material fact as to the third. That is, Defendant concedes that Plaintiff is a member of a protected class (i.e., he is an African-American), was subjected to adverse employment action (i.e., he was terminated), and was replaced by a person outside the protected class (i.e., a white store manager). Defendant argues, however, that Plaintiff fails on element three, in which Plaintiff is required to show that he was qualified for the position at issue.

In order to show that he was qualified for his position, Plaintiff must demonstrate that he was performing at a level that met his employer's legitimate expectations.

Ang v. Procter & Gamble Co. 932 F.2d 540, 548-49 (6th Cir. 1991) (citing *McDonald v. Union Camp Corp.* 898 F.2d 1155, 1159-60 (6th Cir. 1990)). As the court in *McDonald* said: "...the aim is not to review bad business decisions, or question the soundness of an employer's judgment." 898 F.2d 1155 at 1160. Instead, the issue is whether the employer's expectations were *legitimate* ones. Id. In other words, the court must look to see if the employee was performing "to the employer's reasonable satisfaction." *Godfredson v. Hess & Clark, Inc.* 173 F.3d 365 at 372 (6th Cir. 1999).

For Plaintiff to create a question of fact on the issue of whether or not he is "qualified" for his position, he may not simply challenge the judgment of his superiors. *McDonald*, supra, at 1160. As in *McDonald*, in this case Bailey does not challenge the assertion that his superiors, including Donna Mountcastle-Adams (Area Supervisor directly above Mr. Bailey at the time of his termination) and Ted Sterrett (District Manager directly above Ms. Mountcastle-Adams), were dissatisfied with his performance. He acknowledges that on June 26, 2000, he "was provided with a 60 day Budget Plan, to increase the stores [sic] profitability" and that he "was terminated on or about August 16, 2000, for alleged performance issues relative to the store." (Affidavit of Gerard A. Bailey, September 24, 2004, attachment #3 to Plaintiff's Response to Defendant's Motion for Summary Judgment, Dkt. #41.) These steps were taken after nearly a year and a half of problems with Mr. Bailey's performance as store manager, most of which appear to have revolved around his inability or unwillingness to control his food and labor costs in a way that satisfied his superiors.

Mr. Bailey's problems appear to have begun in early 1999, and Ms. Mountcastle-Adams addressed her concerns about this directly to Mr. Bailey and required him to attend management training meetings to learn how to meet the goals set for his store by the Papa John's corporate management. His "labor percentage" (amount of money spent on labor relative to the store's entire budget) was regularly significantly above what was prescribed by the corporate management (over 30% as opposed to between 21.5 and 22%) and his "food percentage" (similar ratio describing the amount spent on food) was also somewhat above his target (32.13% as opposed to the prescribed 30.37%). Although sales in Bailey's store were sometimes at a quite high volume, its profitability was limited by these excessive costs.

Papa John's had developed two techniques, among others, to remedy these types of problems in order to ensure profitability. The company introduced a computerized Labor Management System and it mandated the use of portion-control cups to keep labor and food costs within the manager's control. Mr. Bailey, it appears, specifically decided not to utilize these tools in spite of Ms. Mountcastle-Adams's and others' attempts to warn him that his costs were not within the company's parameters. Ms. Mountcastle-Adams, in June 2000, then drafted the "performance improvement plan" which set forth specific changes to Mr. Bailey's management practices designed to remedy the problems with food and labor costs, among other problems. The plan itself also set forth goals for the store's budget and noted that, if they were not met, Mr. Bailey would be terminated.

Mr. Bailey does not dispute these underlying facts which, taken together, indicate that he simply was not performing to his employer's reasonable satisfaction. He asserts several facts that might explain why his performance was unsatisfactory (a malfunctioning oven that caused him to waste some food; the fact of congestion at the gates to Fort Campbell that extended delivery times and thus increased labor costs) but none of these assertions, even if taken to be true, rise to the level of making the expectations set forth by Ms. Mountcastle-Adams and the other supervisors *unseasonable.* Because the expectations were not unreasonable and there is no genuine issue of material fact as to whether Mr. Bailey was meeting those expectations at the time of his termination, he cannot make out a case for wrongful termination under Title VII.

II. Plaintiff's Claim for Overtime Compensation under the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) requires employers to compensate their employees who work in excess of forty hours per week at a rate of one and one-half times that employee's regular rate of employment for the hours worked in excess of forty. 29 U.S.C. §207(a). It exempts, however, employees who are "in a bona fide executive capacity." 29 U.S.C. §213(a)(1) from this requirement. The "short test" for this exemption reads:

> *Provided.* That an employee who is compensated on a salary basis at a rate of not less than $250 per week, and whose primary duty consists of the management of the enterprise in which the

> employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

29 C.F.R. §541.1(f). So, in order to meet this test, the employee must earn the requisite amount of salary, have a primary duty of management, and regularly direct the work of two or more other employees. Although Mr. Bailey appears to meet these criteria quite easily, he argues that he is in fact *not* an exempt employee (and therefore entitled to overtime compensation). That contention rests on language from one of the statute's implementing regulations which sets forth when an employee will be deemed to be paid "on a salary basis":

> [A]n employee will be considered to be paid `on a salary basis' ...if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

29 C.F.R. §54 1.602(a). The June, 2000 performance improvement plan drafted by Ms. Mountcastle-Adams (though not signed or agreed to by Mr. Bailey) included a provision indicating that if Mr. Bailey failed to meet the goals set forth in the plan, his regular salary would be reduced by $50.00 in the future. Mr. Bailey asserts that this provision removes him from the category of an

employee who is paid "on a salary basis" for FLSA purposes and entitles him to overtime compensation for his hours worked in excess of forty hours per week. This Court finds that the language in these regulations simply cannot be stretched to cover Mr. Bailey.

In *Auer v. Robbins*, the United States Supreme Court held that a policy which "permits disciplinary or other deductions in pay as a practical matter" removed employees from the category of those paid on a salary basis. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The arrangement in the "performance improvement plan" does not, however, contemplate this kind of disciplinary deduction; rather, it provides for the possibility of a prospective reduction in future salary payments in the event of a specific performance failure. This simply is not the kind of deduction considered improper in *Auer*, which dealt with retroactive deductions which amounted to "disciplinary" actions for past conduct. Id. In Mr. Bailey's case, there was no "deduction" in the sense of the statute - a withholding of compensation *already earned*. As the court in *Ackley v. Dept. of Corrections* held: "[f]uture pay adjustments do not implicate the regulation's intent because the employee knows before he or she performs the work what their pay will be." 844 F.Supp. 680, 687 (D. Kan. 1994). Mr. Bailey, then, has no claim for overtime pay because he was paid "on a salary basis" within the meaning of the regulations and thus was an exempt employee.

CONCLUSION

For the reasons outlined above, this Court concludes that Defendant is entitled to summary judgment as a matter of law on both the claim for wrongful

termination and the claim for overtime compensation. Defendant's motion for summary judgment is GRANTED and this case is DISMISSED.

An appropriate order shall issue.
Thomas B. Russell, Judge
United States District Court

CIVIL ACTION NO. 5:02CV-76-R
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, PADUCAH DIVISION

GERARD A. BAILEY, PLAINTIFF

v.

PAPA JOHN'S U.S.A., INC., DEFENDANT

ORDER

Upon Defendant Papa John's U.S.A., Inc.'S (Papa John's) Motion for Attorney Fees (Dkt. # 52), Plaintiff's responses (Dkt. # 55, 56, 59 and 61), and Defendant's replies (Dkt. # 57, 58, and 62), and the court being otherwise sufficiently advised,
IT IS ORDERED:

Defendants shall recover attorneys' fees and costs to be calculated in accordance with the rulings set forth in the accompanying memorandum opinion.

June 14, 2005

Thomas B. Russell, Judge
United States District Court

4/11/2007

CIVIL ACTION NO. 5:02CV-76-R
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE

GERARD A. BAILEY, PLAINTIFF

v.

PAPA JOHN'S U.S.A., INC., DEFENDANT

JUDGMENT

Pursuant to the Court's Order of June 14, 2005 (Docket No. 64),
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment be entered
as follows:

1. Papa Johns U.S.A., Inc. is awarded the sum total of $8,800.00.
2. This judgment may be enforced according to law.

Thomas B. Russell, Judge
United States District Court